IN THE

SUPREME COURT OF THE

UNITED STATES

RECEIVED
FEB 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

October Term, 1980

No. 80-1086

DONALD WYRICK, Warden
Missouri State Penitentiary,

Petitioner,

v.

JOHN DALE HENSON,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

CYNTHIA S. HOLMES
Attorney at Law
915 Olive, Suite 1002
St. Louis, MO 63101
231-7114 (314)
Attorney for Respondent

Comes now John Dale Henson, Respondent, by and through, Cynthia S. Holmes, Attorney at Law, and hereby moves this Honorable Court for Leave to Proceed to file his Response to the Petition of the State of Missouri for Writ of Certiorari, in Forma Pauperis, and as grounds therefore states:

1. The State of Missouri has filed its Petition for Writ of Certiorari from a decision of the United States Court of Appeals for the Eighth Circuit granting Respondent's Petition for Writ of Habeas Corpus and ordering that he be released from the State custody unless he be retried within a reasonable time for the State charge of Murder Second Degree.

2. The Respondent was represented by the undersigned Attorney in the Eighth Circuit, on appointment by that Court after a finding of indigency. Respondent remains an indigent and is without funds to pay retained counsel and without any funds to pay the costs herein.

3. Petitioner remains incarcerated pursuant to said State conviction and remains unable to retain an Attorney or pay any costs herein.

WHEREFORE, Respondent, requests leave to proceed without prepayment of costs, for the appointment of counsel, and for an order dispensing with the printing of any record or brief in the case.

Respectfully submitted,

Cynthia S. Holmes

CYNTHIA S. HOLMES
Attorney for Respondent
915 Olive, Suite 1002
St. Louis, MO 63101
(314) 231-7114

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

Cynthia S. Holmes, being duly sworn and on her oath states that she has read the foregoing Motion and that the facts stated therein are true and correct according to her best knowledge, information and belief.

Cynthia S. Holmes

CYNTHIA S. HOLMES

Subscribed and sworn to before ma a Norary Public this 23 day of January, 1981.

Rita Brannon

NOTARY PUBLIC

My Commission Expires: November 14 1981

I, Cynthia S. Holmes, Attorney for Respondent, John Dale Henson, hereby certify that on the _____ day of January, 1981, a copy of the foregoing Motion to the Supreme Court of the United States was served on the Office of the Attorney General, State of Missouri, P.O. Box 899, Jefferson City, Missouri 65102 by United States mail, postage fully pre-paid.

Cynthia S. Holmes
CYNTHIA S. HOLMES

Subscribed and sworn to before me, a Notary Public this 31 day of January, 1981.

Rita Broaddus
NOTARY PUBLIC

My Commission Expires:
December 14, 1981

No. 80-1086

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,
-vs-
JOHN D. HENSON,
Respondent.

AFFIDAVIT

Comes now Cynthia S. Holmes, duly deposed and sworn, states as follows:

1. I am Cynthia S. Holmes, Attorney for John Henson, a member of the Bar of the Supreme Court of Missouri, and the Supreme Court of the United States and the attorney of record for the Respondent in the Petition for Writ of Certiorari styled State of Missouri v. John D. Henson.

2. On January , 1981, I, on behalf of Respondent John D. Henson, placed in the mail at the United States Post Office in St. Louis, Missouri, the appropriate number of Petitions, Motion to Proceed in Forma Pauperis, addressed, first class postage prepaid, to the Clerk of the United States Supreme Court, Washington, D.C. On that date I also placed in the mail copies of each of these items addressed, first class postage prepaid, to Mr. Paul R. Otto, Office of the Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, Attorney for Petitioner.

3. Pursuant to Supreme Court Rule 28.2 (effective June 30, 1980), Respondent submits this affidavit to show timely filing and proper service.

Cynthia S. Holmes

CYNTHIA S. HOLMES
Attorney for Respondent, John D. Henson
915 Olive, Suite 1002
St. Louis, MO 63101
(314) 231-7114

Subscribed and sworn to before me this 28th day of Janyary, 1981.

Notary Public

My Commission Expires:
December 14, 1981

Cm

IN THE

SUPREME COURT OF THE

UNITED STATES

RECEIVED
FEB 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

October Term, 1980

No. 80-1086

DONALD WYRICK, Warden
Missouri State Penitentiary,

Petitioner,

v.

JOHN DALE HENSON,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CYNTHIA S. HOLMES
915 Olive, Suite 1002
St. Louis, MO 63101
(314) 231-7114

Attorney for Respondent

10

QUESTIONS PRESENTED

1. Whether the respondent contemporaneously objected in the state court or was required to contemporaneously object to the state jury panel on the ground that the bystanders were chosen by the Sheriff?

2. Whether the Court of Appeals' decision in Henson v. Wyrick, No. 79-1808, that the respondent is entitled to a new trial because the sheriff of the county in which the trial was held and the crime occured, and whose deputy investigated the case and testifies against respondent, chose the bystander venirmen pursuant to an order given under the authority of a state statute, by hand selecting from a personally kept list, individuals known to him, and who met with his own subjective critera of good jurors is in error?

3. Whether Respondent is entitled to a new trial because of the inherent prejudice in said selection manner under the facts of this case?

4. Whether the Court of Appeals' action, in remanding the cause for additional evidence, and deciding the cause after the additional evidence without a second Finding of Facts and Conclusions of Law, by the Magistrate and District Court, was apart from the accepted and usual course of proceedings as required by Rule 8?

5. Whether the Court of Appeals, in remanding the cause for hearing and entering an order placing the Burden of Proof upon the State, acted apart from the accepted and usual course of proceedings when in actuality it was the respondent, Petitioner for Writ of Habeas Corpus who presented all of the evidence during the remand for additional evidence?

PARTIES

In the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit, the parties were: John Dale Henson,

Petitioner-Appellant, and Donald W. Wyrick, Warden, Missouri State Penitentiary, Respondent-Appellee.

TABLE OF CONTENTS

PAGE

Questions Presented..... I

Parties..... I

Table of Contents..... III

Table of Authorities..... IV

Opinions Below..... 1

Jurisdiction..... 1

Constitutional and Statutory Provisions Involved.... 2

Statement of the Case..... 2

Reasons for Denying the Writ..... 5

Contemporaneous Objection..... 5

The Issue Decided on Appeal Was the Same Issue Presented to the District Court..... 6

Showing of Actual Prejudice..... 7

Findings of Fact and Conclusions of Law were Submitted by the District Court..... 9

Burden of Proof..... 11

Conclusion..... 12

TABLE OF AUTHORITIES

CASES: PAGES

Henson v. State, 581 S.W.2d 595 (Mo. App. 1979)..... 3

Henson v. Wyrick, No. 79-1808 (8th Circuit 1980)..... 5

Peters v. Kiff, 407 U.S. 493 (1972)..... 9

State v. Henson, 552 S.W.2d 578 (Mo. App. 1977)..... 6

State v. Eugene Holt, 592 S.W.2d 759 (Mo. Banc 1980).... 5,7,8

Wainwright v. Sykes, 433 U.S. 72,97 S.Ct 2497,53 L.Ed. 2d 594 (1977)..... 5,6

Constitutional Provisions:

United States Const. amend. VI..... 2

United States Const. amend. XIV..... 2

Statutes:

28 U.S.C. § 2254..... 1,9

§ 494.250(2), RSMo..... 7

NO. 80-1086

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD WYRICK, Warden,
Missouri State Penitentiary,
Petitioner,

v.

JOHN DALE HENSON,
Appellant.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

The Respondent, John Dale Henson, respectfully requests that this Court deny the Petition for Writ of Certiorari requested by the Petitioner to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The final judgment of the United States Court of Appeals for the Eighth Circuit was filed on November 12, 1980. Pursuant to a Motion to Stay, filed by Petitioner, the Court of Appeals stayed its mandate until January 2, 1981, and, a Petition was filed by Petitioner within Sixty (60) days after entry of the Judgment in the case and this Court's jurisdiction was invoked by Petitioner under 28 U.S.C. Section 1254

(1). This Response is filed within Thirty (30) days of the filing of Petitioner's Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions Involved are set out in pages 3 through 5 of Petitioner's Petition.

STATEMENT OF THE CASE

The Petition was brought herein by the State of Missouri following a decision of the United States Court of Appeals for the Eighth Circuit which held that Respondent was entitled to a new trial or release from custody, because the manner in which the bystander venirmen were chosen in his State Court trial violated the Due Process Clause and Respondent's right to trial by jury. The error found by the Eighth Circuit in the selection of the venirmen was that the Sheriff, whose deputies had investigated the case against Respondent in the State Court and testified therein, hand selected additional venirmen from a list he kept in his office which had been compiled by him using the local telephone directory. From the directory the Sheriff made selections of individuals he knew personally and individuals whom he felt would be good jurors because they were upstanding citizens, and individuals whom the Sheriff felt would not be inconvenienced by jury service.

Respondent was convicted in the State Court after a jury trial of murder in the second degree. Following voir dire, his state court attorney objected to the jury panel as not complying with statutory provisions for selecting a jury. On direct appeal in the State Court the Missouri Court of Appeals considered allegations concerning the selections of the jurors and rejected objections at that time due to the fact that it felt that the record was insufficient as to how the bystander jurors were chosen. Respondent had claimed in

the State Court and believed at that point that the bystander jurors were selected by the deputy Sheriffs who were witnesses against the Defendant.

The Respondent, after rejection of his direct appeal in the State Court, filed a Motion for Post Conviction Relief pursuant to Missouri Supreme Court Rule 27.26. At the trial therein Respondent testified that it was his information and belief that the bystander venirmen had been selected by the deputies who testified against him. Only one of those deputies testified at that hearing that he did not participate in the choosing of the bystander venirmen. On appeal from that post conviction motion, the Missouri Court of Appeals again rejected Henson's claims by stating that it felt the judgment of the trial court was not clearly erroneous and the grounds alleged in the Motion to Vacate the Sentence were not going to be reconsidered as they had been considered in Henson's direct appeal. Henson v. State, 581 S.W.2d 595 (Mo. App. 1979).

The Respondent then filed his application for Writ of Habeas Corpus in the United States District Court for the Eastern District of Missouri pursuant to 28 U.S.C. section 2254, seeking release on bond while the state appeal was pending. Respondent then amended his petition to include among other grounds the ground that the deputy Sheriffs who testified chose the bystander venirmen and the method in which they were chosen denied him Due Process.

In the United States District Court no factual hearing was held and no counsel was appointed to represent Henson, and the case was assigned a U.S. Magistrate for his Review and Recommendations. Based on the filings of various transcripts from the State Court, the United States Magistrate, denied Respondent's Petition for Writ of Habeas Corpus without a hearing. The Magistrate in its findings considered the allegations and while expressing great concerns as to the selection of the bystander jurors rejected those claims of Henson.

In the Eighth Circuit counsel was appointed to represent Henson for the first time.

After oral argument, the United States Court of Appeals for the Eighth Circuit remanded the cause to the District Court for additional evidence to determine exactly how the bystander venirmen had been chosen. The District Court referred the proceeding to the United States Magistrate for hearing, and, after said hearing, the United States Magistrate certified the record of the proceedings to the Court of Appeals. As findings of fact and conclusions of law on the issue before the Court of Appeals previously had been filed, no additional findings were issued by the Magistrate or District Court at that time.

The evidence which emmerged during remand and on which the Eighth Circuit based its decision was that the Sheriff of the County, whose two deputies had investigated the case against Henson and testified in his trial, had selected numerous additional venirmen when the panel to try Henson had run short. The uncontradicted evidence through testimony of the Sheriff, his secretary, and one deputy involved in the Henson case was that the Sheriff kept a list of individuals who could be called for jury service. That list had been selected by the Sheriff and his secretary with the Sheriff having the final say so from the telephone directory. The Sheriff testified that the individuals selected by him were known personally to him, and were in his estimation good citizens who would make good jurors. The Sheriff further testified that he selected individuals who he knew would not be inconvenienced by jury service.

Based on that evidence, as well as the previous record, the Eighth Circuit found in favor of Henson, ruling that he had been denied Due Process in the selection of his jury and that the District Court should direct the Circuit Court of Butler County, Missouri, to release Henson within a reasonable time if he were not retried on the State charges. It is from that opinion that the Petitioner, the State of Missouri, seeks this Court's review.

REASONS FOR DENYING THE WRIT

The Respondent submits that a Writ of Certiorari should not issue because the proceedings in the United States Court of Appeals for the Eighth Circuit in Henson v. Wyrick were in accordance with the accepted and usual course of proceedings; and the final opinion therein, cause no. 79-1808 (Nov. 12, 1980) was proper in the light of accepted procedure and case law and conflicts with no previous decisions of this Court or the Supreme Court of Missouri, and in particular, contrary to the allegation of Petitioner in its petition, does not conflict with the opinion of the Supreme Court of Missouri in State v. Eugene Holt, 592 S.W.2d 759 (Mo. Banc 1980).

CONTEMPORANEOUS OBJECTION

The Respondent fully exhausted his state remedies prior to applying to the District Court for his Writ of Habeas Corpus and the ruling by the Eighth Circuit below is correct that the contemporaneous objection requirement of Wainwright v. Sykes, 433 U.S. 72 (1977), was not violated. The Petitioner argues that Respondent deliberately bypassed his available state remedies, and claims that he failed to contemporaneously object to, and present evidence in support of, his allegation of Constitutional violations due to the selection by the Sheriff of the bystander veniremen in his state trial. The Petitioner, cites the case of Wainwright v. Sykes, supra, in support of that position. The Wainwright case is not applicable to the facts of this case. In Wainwright, there was a specific Florida State Court rule requiring that a Defendant contemporaneously object to a confession, if he was to preserve any complaint as to the voluntariness of that confession for later argument. A close reading of the Wainwright case indicates that it is limited to the facts of that case. This case involves the selection by an interested Sheriff of bystander venirmen to fill a short jury panel, and does not involve an argument as to the voluntariness of

any confession by Respondent in the State Court.

Furthermore, even if there is an across the board contemporaneous objection requirement, the opinion of the Eighth Circuit that Respondent met that requirement is correct.

As stated by the Eighth Circuit in its opinion below, the Missouri Court of Appeals in Respondent Henson's direct appeal from his State Court conviction considered the issue of the selection of the bystander jurors. State v. Henson, 552 S.W.2d 378 (Mo. App. 1977). The Missouri Appellate Court reached the issue and held that there had been insufficient evidence presented by Henson as to his allegations about the improper selection. The Court however did reach the issue and indicated that it had been properly preserved by Henson. Thus in the light of the finding by the State Appellate Court that the objection had been made, and preserved, Petitioner's reliance on Wainwright v. Sykes holding, requiring a State Court objection, must fail. As stated by both the District Court below and the Eighth Circuit in its opinion, there was no Missouri procedural requirement that prevented the Federal jurisdiction over the Constitutional issue raised by Respondent below.

THE ISSUE DECIDED ON APPEAL WAS THE SAME ISSUE PRESENTED IN THE DISTRICT COURT

The Petitioner in its Petition attempts to claim that the Eighth Circuit decided the case on an issue not raised in the District Court. That is an incorrect statement. The case when first presented to the District Court was assigned to a United States Magistrate for his review and recommendation, finding of facts and conclusion of law. In that finding, which is attached to the Petitioner's Petition as an appendix (see page A 16,) the exact issue considered by the Magistrate in his review and recommendation was precisely that decided by the Eighth Circuit. Specifically the Magistrate stated that the issue was:

"(1) The trial court errored in refusing to grant Petitioner's (Henson's) motion to Quash the Jury Panel in that section 494.250 RSMo (1969) is unconstitutional because it allows a Sheriff or Deputy to select jurors at his discretion."

There was no evidence before the Magistrate or the District Court as to the exact procedures used by the Sheriff as the District Court and Magistrate denied Henson a hearing in those courts and denied him the appointment of counsel. Therefore, the Eighth Circuit was correct in deciding the very issue raised, and, in remanding the case to the District Court for additional evidence as to exactly how the bystander venirmen were picked prior to entering its decision. Therefore, the argument of the Petitioner herein that the Eighth Circuit decided the case on a ground not raised in the District Court is clearly erroneous and must fail.

SHOWING OF ACTUAL PREJUDICE

The Petitioner submits in its Petition that this Court should grant a Writ of Certiorari because the Eighth Circuit's decision held that Respondent was not required to show actual prejudice and said decision conflicted with the highest Appellate Court of the State of Missouri in State v. Eugene Holt, 592 S.W.2d 759 (Mo. Banc 1980).

Contrary to the assertions of Petitioner, there are a number of extremely emportant factual distinctions between this case and that of Holt. In the Holt case a special jury was selected by the Sheriff of the county in which the trial was held. No one in that Sheriff's office had investigated the case or participated in the arrest of the Defendant because the trial was held in a County different from the one in which the crime occured and was investigated. In the Henson case, however, the Sheriff choosing the bystander venirmen was the Sheriff of the County in which the alleged crime occured, and whose deputies had investigated the case against Henson and in fact testified against him. In addition, in this case, unlike Holt, there was a factual

showing that the jurors were selected by the Sheriff from his acquaintences and as shown by the evidence from individuals whom the Sheriff thought were upstanding citizens and would make good jurors. No such showing was made in Holt. Contrary to supporting the argument of Petitioner herein, the Holt case indicates that where the Sheriff is more involved in the case or his deputies have an interest in the outcome, the result in Missouri State Courts might have been different and in accord with the Eighth Circuit decision herein. Specifically in Holt the Missouri Supreme Court stated:

> " The Sheriff in New Madrid County had not been engaged in the investigation or arrest in the case and had no apparent interest in convicting the appellant. Since the Sheriff and his Deputies were not involved in this case prior to trial there was no question of the Sheriff acting out of loyalty to deputies or on the basis of special knowledge of the facts of the case. "

All of those facts which the Missouri Supreme Court found lacking in Holt were present in this case and distinguish it from Holt sufficiently to render Holt inapplicable.

Furthermore, the Eighth Circuit found below that the prejudice to Henson below could be implied by the predisposition of a Sheriff in his selections to pick individuals he knew on subjective rather than objective criteria, giving the Sheriff far too much opportunity to express his allegiance to the prosecution by selecting sympathetic jurors. Specifically the Sheriff below testified that he chose individuals that he knew, and whom in his opinion were solid citizens and would make good jurors. He also stated that he selected individuals whom he knew would not mind being jurors and who would not be inconvenienced by the time involved in serving as a juror. This clearly violates the fair cross section requirement as set out by numerous cases and denied Henson a fair cross section of jurors in violation of his constitutional rights as found by the Eighth Circuit.

As stated by the Eighth Circuit jurors who were personal acquaintences of the Sheriff and handpicked by him certainly would have a predisposition to associate the credibility of

the Sheriff's deputies who testified against Henson with the Sheriff selecting them for jury duty. In addition the factors used by the Sheriff in making his selections were not those provided by statute as qualifications for jury service.

Thus, the Court below held that the subtleties involved in identifying the jurors sympathies and predicting their evaluation of the testimony of the deputy Sheriffs would be too intangible to identify during voir dire and present an actual showing of prejudice. Thus, under the circumstances of this case, which would not conflict with any other cases of this or the Missouri Courts, the Eighth Circuit properly held that the potential for prejudice under the facts of the Henson matter were so great that the actual showing of prejudice was not necessary in order to warrant a new trial.

As stated by this Court in Peters v. Kiff, 407 U.S. 493 (1972), the selection of a jury in an arbitrary and discriminatory manner will deny an accused Due Process if the circumstances create the likelihood or appearance of bias. Thus in Peters and numerous cases cited by the Eighth Circuit in its opinion below, (see appendix A of Petitioner's Petition) the probability of prejudice can be such that a conviction should properly be set aside.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE SUBMITTED BY THE DISTRICT COURT

Petitioner's Petition makes the claim that the decision of the Eighth Circuit must be set aside because it violates 28 U.S.C.2254 in that there was no Findings of Fact and Conclusions of Law by the District Court. That allegation by Petitioner is incongrous in the light of their appendix at Page A 16 which sets forth specifically the Magistrates Review and Recommendation. The procedure followed by the Eithth Circuit herein was to remand the case to the District Court and hence to the Magistrate for additional evidence when it found that the findings of facts submitted to it were insufficient. In the District Court, initially, following the filing of Henson's Petition for Writ of Habeas Corpus, no hearing was held and the only facts before the Court were

those set out in Henson's Petition and the State Court's documents filed. The questions raised in the Eighth Circuit, however, were discussed in great detail by the Magistrate whose findings were adopted by the District Court. Thus, the cases cited by Petitioner are not applicable. The procedure by the Eighth Circuit in asking the District Court to supply additional facts, and then, its decision which disagreed with the conclusions of law of the District Court and Magistrate were clearly within accepted procedures.

The Petitioner attempts to claim in this Court that the United States Court of Appeals made a finding of facts rather than the United States Magistrate who was present and able to observe the demeanor of witnesses. There is no case cited by Petitioner and in fact are no cases in which it has been held that the findings of fact by a Magistrate or District Court are determinative of the factual issue and the Appellate Court cannot disagree. The Petitioner claims herein that the Magistrate questioned witnesses during the hearing after the remand and that the questions show that his view of the facts do not equate with the rendition of the facts given by the United States Court of Appeals in their opinion. That statement is totally inaccurate and misleads the Court herein.

This is not a case where there is any dispute as to the facts. The State of Missouri offered no evidence at the hearing on remand which conflicted with that offered by the witnesses produced by Respondent's Attorney. There was no conflict when the facts were presented on remand as to the manner in which the jurors were selected. The Sheriff of Butler County, the County in which the Respondent's State Court trial was held stated that he selected the bystander venirmen from a list which he had made from the County telephone directory of individuals he knew, whom he felt would make good jurors and would not be inconvenienced by serving on a jury. The other evidence before the District Court and the Court of Appeals was that the deputies in that Sheriff's office had investigated the Henson crime, taken incriminatory

statements from him and testified in his trial. The deputies testifying in the hearing before the United States Magistrate and the secretary of the Sheriff all supported his version of how the venirmen were selected, to the extent they were familiar with that method. No contrary evidence was ever presented by the State of Missouri, Petitioner in this court, and therefore the claim presented in their petition herein must fail.

As stated previously there was a finding of facts and conclusion of law presented by the Magistrate and adopted by the District Court which both sides had the opportunity to contest. After that time, the Eighth Circuit in remanding the case for an additional hearing clearly gave the State of Missouri the opportunity to present any and all evidence it desired as to the selection of those jurors. As there was no evidence presented by the State or dispute as to the method, after the Sheriff and his deputies testified, there remained for the Eighth Circuit only the question of applying the law to those facts. That application of law was argued by the State of Missouri and presented to the Eighth Circuit in its brief. Furthermore, no request by the State of Missouri was made before the Eighth Circuit to supplement its brief after the remand for additional evidence nor additional authorities in support of its position presented. Therefore, its Petition for Writ of Certiorari should be denied.

BURDEN OF PROOF

The Petitioner, State of Missouri, complains in this Court that the Eighth Circuit in its order remanding the cause for a hearing to the District Court placed the Burden of Proof on Petitioner herin, Warden Wyrick. No objection was ever filed by the State of Missouri to that order in the Eighth Circuit Court of Appeals either before or after the hearing by the Magistrate of the additional evidence. While

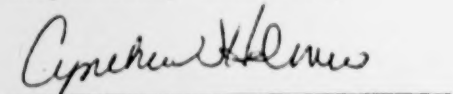
the State objected in front of the United States Magistrate to the Burden of Proof being placed upon them, and said objection was overuled, in actuality there was no Burden placed on the State. The record below reveals that all of the evidence presented to the Magistrate on the rehearing was presented by the attorney for the State prisoner, John Henson. The Sheriff, and all of his deputies were subpeonaed by Henson's attorney and all of the evidence on which the Eighth Circuit ultimately relied in issuing its decision was aduced by said attorney. In addition a deposition of the secretary for the Sheriff of Butler County was taken and presented to the Court by Henson's attorney. Thus, all of the evidence before the Eighth Circuit was produced by Respondent Henson, and not the State of Missouri, and they had numerous and sufficient opportunity to meet and contest the evidence presented.

Thus, even if the Burden of Proof should not have been placed on the State on remand, there was no prejudice to the State as it was in actuality required to produce no evidence, and, in fact, had no evidence contrary to that brought forth by Respondent Henson. Therefore, its claims that the error in giving it the Burden of Proof on remand entitles Petitioner to a Writ of Certiorari must fail.

CONCLUSION

For the foregoing reasons, Respondent herein, John Henson respectfully submits that the Petition for a Writ of Certiorari by the State of Missouri should be denied.

Respectfully submitted,



CYNTHIA S. HOLMES # 23033
Attorney for Respondent, John D. Henso
915 Olive, Suite 1002
St. Louis, MO 63101
(314) 231-7114